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IN THE
Supreme Court of the United States RODAK, JR., CL.

OCTOBER TERM, 1971

No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City
Human Resources Administration and HARRY I. BRON-
STEIN, City Director of Personnel and Chairman of the
New York City Civil Service Commission,

Appellants,

against

PATRICK Mc L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,
and SYLVIA CASTRO, individually and on behalf of all
others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR ATTORNEY GENERAL
OF THE STATE OF NEW YORK**

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Opinions Below

The opinion of the single district judge ordering the
convening of a three-judge district court (A. 38-43),* dated
May 24, 1971, is reported at 330 F. Supp. 265. The opinion
of the three-judge court and the concurring opinion of

* References prefixed by the letter "A" refer to the Appendix
filed with this Court.

Circuit Judge Lumbard (A. 81-92), dated November 9, 1971, are reported at 339 F. Supp. 906. There are no separate findings of fact and conclusions of law.

Jurisdiction

The order of the district court (A. 93-94) was entered on December 23, 1971. The municipal appellants filed a notice of appeal (A. 95-96) on January 19, 1972. The Attorney General of the State of New York filed a notice of appeal (A. 97-98) on January 21, 1972. The jurisdictional statement was filed on March 24, 1972. This Court noted probable jurisdiction on June 12, 1972.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statute Involved

New York Civil Service Law § 53 states:

Citizenship requirements

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

2. Notwithstanding any of the provisions of this chapter or of any other law, whenever a department head or appointing authority deems that an acute shortage of employees exists in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment, he may present evidence thereof to the state or municipal civil service commission having jurisdiction which, after due inquiry, may determine the existence of such shortage and waive the citizenship requirement for appointment to such class or classes of positions. The state commission or such

municipal commission, as the case may be, shall annually review each such waiver of the citizenship requirement, and shall revoke any such waiver whenever it finds that a shortage no longer exists. A non-citizen appointed pursuant to the provisions of this section shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship.

Questions Presented

1. Whether, under any of the standards of review articulated by this Court, aliens are denied the equal protection of the laws by the operation of Civil Service Law § 53?
2. Whether the district court applied the correct standard under the Equal Protection Clause in requiring that New York Civil Service Law § 53 be supported by a compelling state interest?
3. Whether Civil Service Law § 53 conflicts with a comprehensive federal plan for the regulation of immigration and naturalization of aliens?
4. Whether Civil Service Law § 53 erects an obstacle to aliens entering and abiding within the State of New York inconsistent with federal policy?

Statement of the Case

The named appellees are aliens residing in the State of New York. From December 28, 1970 until March 5, 1971, they were employed in the New York City Civil Service. They entered the city service when two privately sponsored job training programs in which they had been employed were merged with a similar city program administered by the New York City Human Resources Administration. Ap-



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pellees were appointed provisionally to competitive class titles utilized by that Administration.* They performed duties ranging from administering the program (appellee Dougall) to semi-professional counselling (appellee Castro) to stenographic and clerical appellees Jorge and Vargas) (A. 31-34).

Shortly after their civil service employment commenced, a routine personnel investigation conducted by the New York City Department of Personnel disclosed the alien status of the named appellees and sixteen others who were similarly employed. Their provisional appointments were then revoked and their services terminated pursuant to the requirements of Civil Service Law § 53, subd. 1 (A. 32-33).**

Appellees claimed below that to distinguish between citizens and aliens in appointments to the career civil service pursuant to § 53 violated their Fourteenth Amendment

* The N.Y.S. Civil Service Law describes four classes of positions within the classified civil service: competitive (§ 44), exempt (§ 41), non-competitive (§ 42) and labor- (§ 43). The competitive class is commonly referred to as the career service and includes all positions "for which it is practicable to determine the merit and fitness of applicants by competitive examination". Civil Service Law § 44; N.Y. Const. Art. 5, § 6. Civil Service Law § 65 subd. 1 authorizes provisional appointments to the competitive class without examination when appropriate eligible lists of examined candidates are not available to fill vacancies. Provisional appointments are of brief duration. Civil Service Law § 65, subds. 2, 3, and 4. In contrast to the candidate appointed following the competitive examination, a provisional appointee cannot acquire tenure, promotion eligibility or seniority preferences by reason of his provisional service. Civil Service Law §§ 52, 75 subd. 1, 80, 81. See *Matter of Koso v. Green*, 260 N.Y. 491 (1933); *Matter of Rohl v. Jeacock*, 259 App. Div. 208 (4th Dept.), *aff'd* 284 N.Y. 260 (1940); *Matter of Poss v. Kern*, 263 App. Div. 320 (1st Dept. 1942).

** Appellee Castro was terminated for the additional reason that she lacked sufficient relevant experience to qualify for her civil service appointment (A. 49, 76 and Deft's Ex. "4" p. 1 [Orig. Rec.]).

rights, infringed their right to travel interstate and to enter and reside within New York State. They further alleged that the power to regulate the activities of aliens was vested exclusively in the federal government, and, alternatively, that the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, had pre-empted state regulation in this field (A. 8-10). The amended complaint sought the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284, a class action order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, a temporary restraining order pursuant to 28 U.S.C. § 2284 enjoining the enforcement of § 53, final declaratory and injunctive relief, and damages in the amount of \$10,000 for each appellee (A. 10-12).

By order to show cause the named appellees moved for a class action order, for the convening of a three-judge court, and for a temporary restraining order enjoining the municipal appellants from terminating their employment and that of other persons similarly situated (A. 12-15). The municipal appellants opposed the motion and moved to dismiss the action on the ground of lack of subject matter jurisdiction (A. 30). Both motions were submitted to District Judge Charles H. Tenney on May 4, 1971.

In his opinion and order dated May 24, 1971, the District Judge held that subject matter jurisdiction was conferred by 28 U.S.C. § 1343(3). Relying principally on *Purdy & Fitzpatrick Co. v. State*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), which declared a state statute prohibiting contractors from employing aliens on public works projects unconstitutional, Judge Tenney found that substantial questions under the Equal Protection Clause and the Congressional scheme for immigration and naturalization were presented and directed that a three-judge court be convened. He referred the request for a class action order to the three-judge court and refused to issue a temporary restraining order (A. 38-43).

The three-judge court designated by the order of the Chief Judge of the United States Court of Appeals for the Second Circuit consisted of Circuit Judge J. Edward Lumbard and District Judge Edward C. McLean in addition to Judge Tenney. The municipal appellants answered (A. 44-74) and moved for summary judgment (A. 74). Pursuant to 28 U.S.C. §§ 2281 and 2284(2), the Attorney General of the State of New York was advised on June 7, 1971 that an action seeking to enjoin the operation of § 53 upon the ground of unconstitutionality was pending before the three-judge court. The Attorney General thereupon appeared in defense of the constitutionality of statute. The case was heard before the three-judge court on July 13, 1971.

On November 9, 1971, the three-judge district court issued its opinion declaring § 53 unconstitutional and granting appellees preliminary and permanent injunctive relief (A. 81-92).^{*} A concurring opinion was issued by Circuit Judge Lumbard (A. 90). The order thereon was stayed pending appeal to this Court (A. 94).

The opinion of the three-judge court rests on the assumption "rationale and holding" of *Graham v. Richardson*, 403 U.S. 365 (1971) "control the outcome" of appellees' challenge to § 53 (A. 82).

^{*} The court also granted appellees' request for a class action order defining the class as follows: "The class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of civil service" (A. 91 n. 4). Under the terms of the district court order (A. 93-94), appellee Castro was excluded from the class. The court apparently reached this result because she was terminated for her lack of appropriate experience in addition to her alienage (See footnote at p. 4, *ante*). Accordingly, she was not a person who, but the enforcement of § 53, "would otherwise be eligible to compete for employment in the competitive class. . . ." This portion of the three-judge court order is not in issue.

The court first considered § 53 under the Equal Protection Clause. Citing *Graham v. Richardson*, *supra* at 372, for the principle that classifications based on alienage are subject to "close judicial scrutiny", and finding a complete identity between that standard and the compelling state interest test, the court reviewed two state interests urged in support of the statute: (1) the government's right to conduct its affairs through the agency of persons with undivided allegiance; and (2) the government's need to employ citizens rather than aliens in order to maintain the efficiency and stability of the career civil service (A. 83).

In reviewing the first interest, the court rejected appellant's argument that the alien's allegiance to the country of his nationality made him unsuitable for employment in the career civil service, apparently finding that only a showing that aliens were security risks could satisfy the compelling state interest test. Had appellants attempted to make this showing, the court goes on, they would have been "on particular shaky ground" because of the availability of other classes of public employment (Civil Service Law §§ 41, 42) and the waiver provisions of § 53 subd. 2 (A. 83-84, 91 n. 6).^{*} The court then concluded that the state interest in employing persons of undivided allegiance in the career service is merely a restatement of the "special public interest doctrine" rejected as insufficient by this Court in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) and *Graham v. Richardson*, *supra* (A. 83). Under that doctrine, the state was entitled to prefer

^{*} In this context the court stated that the classes of positions in which aliens may be employed at the discretion of the appointing authority (Civil Service Law §§ 41, 42) are "generally higher paying" and "more responsible" than competitive class positions (A. 91-92 n. 6). Neither the Attorney General nor the municipal appellants so argued below, and there is no evidence in the record to support this proposition.

citizens in distributing its resources on the theory that the citizens, as the members of the state, were the beneficial owners of the resources.

The court also treated the second interest in terms of the state's concern for conserving its resources. Characterizing appellants' argument as limited to the state's economic interest in training new employees to replace departing aliens, the court compared the risk to the career service from the permanent resident alien who has resided in the state "for a number of years" and "whose family resides here" with that from the citizen resident newly arrived in the state and found the citizen resident no better risk than the alien (A. 84-85).^{*} The court then assumed the comparison in appellants' favor but still found that the requirements of the Equal Protection Clause were not met, presumably on its view that *Graham v. Richardson* mandated the application of the compelling state interest test (A. 85).

Turning to consideration of the paramount federal power over the regulation of aliens, the court held that § 53 conflicted with the Supremacy Clause of the Constitution. In support of its position, the court cited the "comprehensive plan for the regulation of immigration and naturalization" enacted by Congress (referring to the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* and 42 U.S.C. § 1981) and the federal policy forbidding a state to deny entrance and abode to aliens lawfully admitted to the United States (A. 87-88). Without further discussion of the terms of the alleged comprehensive plan governing the public employment of aliens and what impact, if any, § 53 has on an alien's entry and abode

^{*} The court does not limit its holding on § 53 to the constitutionality of the statute as applied to permanent resident aliens. Rather, the statute is declared unconstitutional on its face and its enforcement is enjoined without exception.

in the State of New York,* the court simply assumed an identity between the employment of aliens in the career civil service and restrictions on their participation in public assistance programs (A. 88).

"Since the federal government has preempted the field in the case of denying aliens welfare assistance, it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned on long-term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Section 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens."

In his concurring opinion, Circuit Judge Lumbard described the area to which the court's opinion did not extend as "those positions where citizenship bears some

*The court cited *Sailer v. Leger*, decided with *Graham v. Richardson*, for the proposition that "very little actual impact" is necessary before a state statute contravenes the exclusive federal power to admit and exclude aliens (A. 92 n. 8). The court did not take note of the stipulation in the *Sailer* record which states: "[T]he denial of general assistance to aliens otherwise eligible for such assistance causes undue hardship to them depriving them of the means to secure the necessities of life, including food, clothing and shelter" and that 'the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs.'" *Graham v. Richardson*, *supra* at 370.

rational relationship to the special demands of the particular position." He continued: "There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and city, and their citizens, may properly require the officeholder to be a United States citizen" (A. 90).

Judge Lumbard's opinion is difficult to reconcile with that of the three-judge court. First, he appears to accept the traditional reasonable relation standard as applicable § 53. Second, he appears to accept appellants' argument that the alien's allegiance to the country of his nationality distinguishes him from the citizen with respect to career civil service and to reject the court's finding that § 53 merely reflects an economic preference in favor of citizens.

Summary of Argument

The right of the State to conduct its affairs through the agency of citizens and not aliens rests on the fundamental principal that sovereign functions must be performed by members of the State. This principle is reflected in the laws of nations and, in particular, in the laws of the United States and the State of New York, which exclude aliens from elective office, political rights and occupations intimately related to the affairs of government including the career civil service. In contrast to citizens, the alien owes primary allegiance to the country of his nationality, and must honor the obligations that country places on its nationals abroad. In the country of his residence, he has special privileges not shared by citizens which include diplomatic intervention on his behalf by the country of his nationality. Conversely, the country of his residence may limit the length of his stay and place severe limitations on his freedom of movement.

In light of these considerations, the State may distinguish between citizens and aliens in selecting employees to administer its internal affairs consistently with the aliens' rights under the Equal Protection Clause. In enacting New York Civil Service Law § 53, the State of New York has made this distinction in the only manner consistent with the unique characteristics of the career civil service. Its legislation in this area cannot be equated with restrictions on aliens' participation in public assistance programs where the citizen and alien are identically situated and where the state has evidenced a concern for its fisc by employing a crude economic preference. *Graham v. Richardson*, 403 U.S. 365, 374-376 (1971).

In view of its application to public employees and its relationship to the integrity and efficiency of the career civil service, § 53 is properly reviewed under the traditional equal protection standard. However, if § 53 is characterized as a "suspect" classification in this context, only the "close judicial scrutiny" branch of the strict equal protection standard is appropriate, not the "compelling state interest test" reserved for classifications which infringe specific constitutional or fundamental rights.

Properly viewed, "close judicial scrutiny" requires the Court to determine whether the alleged "suspect" criterion employed in the classification (here, alienage) is the "necessary" means of achieving a valid state interest. Since the use of a suspect criterion does not in itself infringe a constitutional or fundamental right, there is no occasion to weigh the state interests to determine whether they are "compelling".

As applied to the case at bar, the Equal Protection Clause is satisfied by appellants' showing that the nature of public employment and the unique characteristics of the career civil service require that a potential employee be considered in terms of his alien status pursuant to a rule of general application like § 53. However, if the Court

considers the state interests as against those of the aliens affected, the state interests must be found more "compelling." The government's right to conduct its internal affairs through the agency of persons who do not owe their primary allegiance to a foreign power and who are not subject to special privileges and burdens which impair both their capacity to identify with the public interest and the efficiency of the career civil service outweighs the alien's interest in competing for one class of positions in public employment on the same terms as citizens.

In enacting § 53 the State of New York has used powers reserved to it under the Tenth Amendment to determine the qualifications of its own employees. The federal government has no role in this regard. Even if Congress were empowered to make such regulations for the states, it has not done so in either the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, or in 42 U.S.C. § 1981. Both statutes have been held to permit state legislation with respect to aliens and neither evidences any Congressional intent to preclude the consideration of alien status by the public employer. Indeed, the only federal policy in this area is expressed in the federal statutes and regulations which distinguish between the citizens and aliens in appointments to the federal career service in the same manner as the State of New York under § 53.

POINT I

New York Civil Service Law § 53 does not deny aliens the equal protection of the laws under any of the standards of review articulated by this Court. The identity of the career civil service with the internal affairs of government requires that the alien's primary allegiance to the country of his nationality and the special privileges and burdens of alien status be considered with respect to his suitability for appointment. The state interests in this regard can only be achieved through a rule of general application like § 53 and outweigh the alien's interest in competing for this class of positions on the same terms as citizens.

- A. The applicable standard of review under the Equal Protection Clause cannot be more stringent than that of "necessary" relation to a valid state interest.

The public employer has broad discretion to establish qualifications for its employees related to the integrity and efficiency of the operations of government. *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947); *Keim v. United States*, 177 U.S. 290, 293 (1900). The exercise of this discretion has been sustained even when it touches upon such fundamental freedoms as the employee's right to openly support the political party and candidate of his choice. *United Public Workers v. Mitchell*, *supra*. As stated there (330 U.S. *supra* at 101): "For regulation of [public] employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."

In terms of the Equal Protection Clause, the regulations affecting the qualifications of public employees must be assessed under the traditional "reasonable relation" standard. See *United Public Workers v. Mitchell*, *supra*. State regulation of professions and trades affected by the public

interest is reviewed under the same equal protection standard. *Law Students Research Council v. Wadmond*, 401 U.S. 154, 167 (1971); *Schware v. Board of Law Examiners of New Mexico*, 353 U.S. 232, 239 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 556 (1947). There is no occasion to depart from this standard in the case at bar.

In distinguishing between aliens and citizens in terms of their qualifications for public employment, § 53 reflects considerations bearing directly on the integrity and efficiency of the career civil service. Just as Congress was entitled to broad latitude in considering the risks occasioned the federal career service by the employment of persons who are actively identified with a political party or candidate, so the State of New York is entitled to the same latitude in considering the risks occasioned its career service by employing persons who owe primary allegiance to a foreign power and who are subject to special privileges and burdens not shared by citizens. See *United Public Workers v. Mitchell*, *supra* at 96-103. Indeed, citizenship requirements for the federal career service substantially identical with § 53 have been sustained under a "reasonable relation" test.* *Mow Sun Wong v. Hampton*, 333 F. Supp.

* The United States Civil Service Commission provides by regulation as follows (5 C.F.R. § 338.101 (1972)):

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States;

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. . . .

5 C.F.R. § 338.101(b)(1) and (b)(2) (1972) authorize the employment of aliens in the career service when citizens are not available and in other rare circumstances. 5 C.F.R. Part 213 provides for an "excepted service" similar to the exempt and non-competitive classes under New York Civil Service Law §§ 41, 42. The federal legislation, orders and regulations are set forth in pertinent part at Exhibit "1" hereof.

527, 532 (N.D. Cal. 1971), app. pending 9th Cir. No. 70-2730, as have citizenship requirements for the practice of law. *In Re Griffiths*, 40 U.S. Law Week 2566 (Conn. Sup. Ct. Feb. 15, 1972), prob. juris. noted — U.S. — (1972), 40 U.S. Law Week 3576 (June 7, 1972 Doc. No. 71-1336). See also *Jalil v. Hampton*, — F 2d — Slip Op. 11 (D.C. Cir. March 8, 1972 Doc. No. 24,640), cert. appl'd for Doc. No. 71-1574, citing Circuit Judge Lumbard's concurrence herein as stating the appropriate standard for review of the federal career service regulations.

State legislation considering aliens in the context of their qualifications for public employment cannot be identified with "suspect" classifications applied selectively to certain races or nationalities or with restrictions on aliens' participation in public assistance programs requiring review under a strict equal protection standard. Cf. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971).

"The clear and central purpose of the Fourteenth Amendment was to eliminate all official sources of invidious racial discrimination in the States," and, accordingly such classifications have been subjected to a strict equal protection standard. *Shapiro v. Thompson*, 394 U.S. 618, 758-759 (1969) (opinion of HARLAN, J. dissenting).^{*} Similarly, classifications applied selectively on the basis of nationality and lineage have historically reflected racial distinctions appropriate to a strict standard of review.^{**}

^{*} E.g. *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964) (stating, in the context of criminal prohibition against Negro/white cohabitation, that race was "constitutionally" . . . "irrelevant"); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (requiring "very heavy burden of justification" in reviewing a prohibition against interracial marriage); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (scrutinizing racial segregation in District of Columbia public schools with "particular care" and terming racial classifications "constitutionally suspect").

^{**} E.g. *Oyama v. California*, 332 U.S. 633, 644-646 (1948) (applying the compelling state interest test to state law which re-

In contrast, statutes treating aliens as a generic class have been reviewed under the traditional equal protection standard.* Compare *Sei Fujii v. State*, 242 P. 2d 617, 625-630 (Cal. Sup. Ct. 1952) (applying "rigid scrutiny" to alien land law which prohibited aliens ineligible for citizenship, i.e., Japanese and a few other Mongolian nationalities, from owning land after finding that the statute discriminated on the grounds of race and nationality) with *Terrace v. Thompson*, 263 U.S. 197, 218-221 (1923) (applying reasonable relation test to alien land law which applied to all non-declarant aliens). Even when classifications have affected aliens in terms of nationality or race, this Court has not applied a strict equal protection standard. Thus in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), administrative action which excluded Chinese from engaging in the laundry trade was invalidated on the ground that public officials had provided "no reason" for their action, and in

(footnote continued from preceding page)

quired stronger evidentiary showing to avoid escheat from citizens born of aliens ineligible for citizenship, i.e. Japanese and a few other Mongolian nationalities, than from descendants of citizens or other alien nationalities); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying "most rigid scrutiny" to war measures against alien Japanese and citizens of Japanese ancestry); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (stating in the context of war measures against alien Japanese and citizens of Japanese ancestry that distinctions between citizens on the basis of ancestry or race are "odious to a free people" and "irrelevant" in most circumstances).

* It appears that the degree of judicial scrutiny afforded generic classifications of aliens under the "special public interest" doctrine was even less stringent than the traditional equal protection standard. E.g. *Heim v. McCall*, 239 U.S. 175 (1915) and *Crane v. New York*, 239 U.S. 195 (1915) (exclusion of aliens from public works projects presents only considerations of policy with which the judiciary has no concern); *Patson v. Pennsylvania*, 232 U.S. 138, 144 (1914) (exclusion of aliens from hunting wild game is a policy judgment based on "local experience" which courts should be "very slow" to reject); *Clarke v. Deckebach*, 274 U.S. 392, 396 (1927) (exclusion of aliens from operating billiard and pool rooms is question for legislature to determine based on nature of the occupation and local conditions).

Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) a state statute prohibiting the issuance of commercial licenses to aliens ineligible for citizenship, i.e., Japanese and a few other Mongolian nationalities, was invalidated on the ground that the state's claim of ownership to the fish swimming in its offshore waters, and thus its "interest" in preserving the supply for its citizens, was "inadequate" to justify the exclusion of aliens.* Since Civil Service § 53 establishes a generic classification reflecting the special requirements of public employment in the career civil service, the strict equal protection standard reserved for classifications selective as to race or nationality is not appropriate.

Similarly, the special concern which this Court has shown in the context of public assistance programs is not appropriate to § 53. See *Graham v. Richardson*, *supra* at 379-380, *Shapiro v. Thompson*, *supra* at 627, *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970). In the absence of a job in the public sector, neither the alien nor the citizen is deprived of the necessities of life while without welfare benefits neither, if indigent, can survive.** The state interest in its welfare program is purely a financial one. Both in terms of their contributions as taxpayers and their needs as recipients, the citizen and the alien stand on identical terms with respect to that interest. Thus, to invoke alien status as a criterion for eligibility for public

* Significantly, the result in *Graham v. Richardson*, *supra*, can be reached under the same standard used in *Takahashi*: the state interest in the preservation of its fisc is "inadequate" to justify the exclusion of aliens from welfare benefits to which they have contributed on the same basis as citizen tax payers.

** The difference in significance between the welfare recipient's interest in public assistance and the public employee's interest in his job is reflected in the fact that the recipient is constitutionally entitled to a pre-termination hearing, *Goldberg v. Kelly*, *supra*, while the public employee is not. *Board of Regents v. Roth*, — U.S. — (1972), 40 U.S. Law Week 5079 (June 29, 1972).

assistance is to establish a crude economic preference unsupported by any relevant distinction between the citizen and the alien. *Graham v. Richardson*, *supra* at 374-376. In contrast, the state interest in the integrity and efficiency of the career civil service requires that alien status be recognized in qualifying employees. Thus, the fact that alien status is a "suspect" criterion with respect to restrictions on aliens' participation in a public assistance program where he is identical with the citizen in all material respects does not make it "suspect" in the context of public employment where state interests involved require that the alien and the citizen be considered light of their differences. See *McDonald v. Board of Election*, 394 U.S. 802, 808-809 (1968) (applying the traditional "reasonable relation" standard in reviewing alleged infringement of fundamental right to vote).

Even accepting *arguendo* that § 53 establishes a "suspect" classification requiring "close judicial scrutiny", that branch of the strict equal protection standard must be distinguished from the "compelling state interest test". Only the former may be applied to the case at bar. See *Graham v. Richardson*, *supra* at 371-372, 375-376.

"Close judicial scrutiny" is afforded to legislation which defines the class of persons to whom it applies in terms of a "suspect" criterion generally considered irrelevant to a valid state interest. *Graham v. Richardson*, *supra* at 371-372 and cases cited at n. 5 and n. 6. Under this branch of the strict equal protection standard, the Court may not require appellants to meet a higher burden of proof than that required in defense of racial classifications, i.e., "necessary" relation to a valid state interest. *Loving v. Virginia*, *supra* at 11; *McLaughlin v. Florida*, *supra* at 196.*

* In *McLaughlin*, the Court invalidated a cohabitation statute which applied a more onerous evidentiary presumption to Negro/

In contrast, the "compelling state interest" test is applied to legislation which infringes a specific constitutional or fundamental right of the members of the class. Under this test, the state interests must be weighed against the rights infringed by the statute.* There is no constitutional or fundamental right to public employment, and accordingly the "compelling state interest" test has no application to the case at bar. *Board of Regents v. Roth*,

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white interracial couples. It was assumed that the purpose of the statute was to deter promiscuity and that such a purpose was valid. Upon finding no evidence to support greater public anxiety about promiscuity among interracial couples than others, the Court then concluded that the classification was not "necessary . . . to the accomplishment of a permissible state policy" noting that a statute "neutral as to race" would be just as effective in achieving the state interest. 379 U.S. *supra* at 196. Similarly in *Loving*, the Court invalidated a miscegenation statute prohibiting marriage between whites and Negroes stating that a racial classification could be upheld only if shown to be "necessary to the accomplishment of some permissible state objective, independent of racial discrimination." 388 U.S. *supra* at 11. The Court then found that the only objective of the statute was the maintenance of white supremacy, an "impermissible" state interest. 388 U.S. *supra* at 11. Statements in *McLaughlin*, *supra* at 192 and *Loving*, *supra* at 11 referring to "overriding statutory purpose" do not intend the application of a balancing test to determining whether the objective sought is "compelling" but refer rather to the established principle that racial classifications cannot be sustained as ends in themselves but only as the means of achieving a state objective "independent" of race. *Loving v. Virginia* *supra* at 10-11 and cases cited.

* E.g. *Dunn v. Blumstein*, 405 U.S. 330, 336-342 (1972) (right to travel and right to vote infringed by one year (state) and three month (county) durational residence requirement to register to vote); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968) (right of political association and right to vote infringed by restrictions on party's obtaining position on ballot); *Shapiro v. Thompson*, *supra* at 634, 638 (1968) (right to travel infringed by one year durational residence requirement for welfare benefits); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969) (right to vote infringed by limitation of franchise in school district elections to residents eligible to vote in state and federal elections who in addition are lessees or owners of real property within the district or parents or custodians of children enrolled in the district schools).

supra; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895-899 (1961); *Bailey v. Richardson*, 182 F. 2d 46, 57 (D.C. Cir. 1950), *aff'd* 341 U.S. 918 (1951); *Taylor and Marshall v. Beckham*, 178 U.S. 548 (1900); *Ex parte Sawyer*, 124 U.S. 200 (1888); *Butler v. Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402 (1850); *Crenshaw v. United States*, 134 U.S. 99 (1890). See also *Kirk v. Board of Regents*, 79 Cal. Rptr. 260, 266 (1969), *appl. dismiss'd* 396 U.S. 554 (1970) (identifying the opportunity for higher public education with the opportunity for public employment and holding that no fundamental right was infringed by a durational residence requirement of one year for reduced tuition).*

Properly viewed, "close judicial scrutiny" requires a different kind of analysis than the "compelling state interest test".

"Close judicial scrutiny" analyzes the relationship between the "suspect" criterion employed in defining the class and the objectives of the statute, or "state interests". Once the burden of establishing that the criterion is "necessary" to the achievement of the state interests is met, the judicial inquiry is at an end. *Loving v. Virginia*, *supra* at 11; *McLaughlin v. Florida*, *supra* at 196. There is no occasion for the court to proceed to weigh the state interests to determine whether they are "compelling" since the employment of a suspect criterion does not *simpliciter* infringe a constitutional or fundamental right, as here, the use of alienage as a criterion does not infringe any such right possessed by aliens. Thus, a "suspect" criterion may be examined for its appropriateness in achieving the

* In stating that employment in the career civil service is not a constitutional or fundamental right, appellants do not contend that public employment is a "privilege" and thereby immune from constitutional scrutiny, *Board of Regents v. Roth*, *supra* at 5081 n. 9, but only that an individual's interest in following this occupation is not of such dimension as to require the application of the "compelling state interest test."

state interests reflected by the statute and compared with other means, if any, for achieving the same purpose, as here § 53 may be examined for its "necessary" relationship to the state interests in integrity and efficiency of the career civil service which it effectuates. Since criterion is merely a means of achieving certain state interests, it cannot be compared or weighed against the interests themselves, as here "alienage" cannot be weighed against the integrity and efficiency of the career civil service.

The balancing process is only appropriate under the "compelling state test" where specific substantive rights are infringed by the operation of the statute which, in turn, can be "weighed" against the significance of the state interests. Thus, in *Dunn v. Blumstein, supra*, the fundamental right to vote and to travel could be weighed against the administrative conveniences and community interests served by a durational residence requirement for voting; in *Williams v. Rhodes, supra*, the fundamental right to vote and to free association could be weighed against the state interests in avoiding the consequences to electoral process of political splinter groups; and in *Shapiro v. Thompson, supra*, the fundamental right to travel could be weighed against the administrative conveniences served by a durational residence requirement for welfare benefits. No such substantive rights of aliens are affected by the operation of § 53 and thus, there is no occasion to "weigh" the significance of the state interests here involved. Indeed to do so would be inconsistent with the latitude traditionally afforded the public employer in qualifying and regulating its employees where the efficient operations of government are involved. *United Public Workers v. Mitchell, supra*. See discussion pp. 13-15 *ante*.

However, assuming that this Court reviews § 53 as to its "necessary" relation to the state interests reflected by statute and then balances those interests against the interests of the aliens affected, the statute is constitutional under the Equal Protection Clause.

B. The distinction between citizens and aliens established by Civil Service Law § 53 bears a "necessary" relation to the state interests of integrity and efficiency in the career civil service. The State must consider the alien's primary allegiance to the country of his nationality and the special privileges and burdens incident to alien status in determining his suitability for public employment. These state interests can be achieved and the competitive character of the career civil service maintained only through the use of a rule of general application like § 53.

The validity of the state interest in employing citizens to conduct its internal affairs is apparent. It rests on the fundamental concept of identity between a government and the members, or citizens, of the state. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (opinion of FRANKFURTER, J. concurring); *United States v. Cruikshank*, 92 U.S. 542, 549 (1876); *Minor v. Happersett*, 21 Wall. 162, 165-166 (1875). Thus in practically every nation aliens may not exercise political rights, hold elective office or obtain employment in the career civil service. Roth, *The Minimum Standard of International Law Applied to Aliens* 151-154 (1949); See generally United Nations Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* (1966).*

* The practice of the federal government and of the State of New York illustrate this concept. The United States Constitution requires that the President be a natural born citizen (Art. 2, § 1); a Senator, a citizen for nine years (Art. 1, § 2; a Representative, a citizen for seven years (Art. 1, § 2). As noted at pp. 14-15, *ante*, the citizenship requirements for the federal career service are substantially identical with New York Civil Service Law § 53. See Exhibit "1". The New York State Constitution requires citizenship of the Governor and Lieutenant Governor (Art. 4, § 2); members of the Legislature (Art. 3, § 7); and voters (Art. 2, § 1). New York State also requires citizenship of public officers (Public Officers Law § 3); attorneys (Judiciary Law § 460); and trial and grand jurors (Judiciary Law §§ 504[1], 531[3], 596[1], 609[1], 662[1], 684[1]).

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Like the elected official, the civil servant should be capable of representing the public interest with complete integrity. He participates directly in the formulation and execution of government policy and thus must be free of obligations, including those to a foreign state, which might impair the exercise of his judgment or jeopardize public confidence in his objectivity. See *United Public Workers v. Mitchell*, *supra* at 97-101 and opinion of DOUGLAS, J. dissenting in part at 121-122. This is true of all positions within the career service, *United Public Workers v. Mitchell*, *supra* at 102, particularly those in the administrative category held by the named appellees. *United Public Workers v. Mitchell*, *supra* at 122 (opinion of DOUGLAS, J. dissenting in part).*

The significance which the State of New York attaches to the integrity of its employees in representing the public interest is reflected by the requirement that all employees of the state and its subdivisions, except employees in the labor class, take an oath or file a statement pledging to

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The citizenship requirement for appointment to the career civil service was added to the N.Y. Civil Service Law and to the Rules for the Classified Service of the State of New York by N.Y.L. 1939 c. 767 §§ 1, 2 effective June 7, 1939. Prior to that date, the state and local civil service commissions could require citizenship for appointment pursuant to their power to make rules and to ascertain the fitness of applicants. N.Y. Consol. L. 1909 c. 15 §§ 6, subd. 1, 9, 11, 14; N.Y.L. 1889 c. 370 §§ 6, ¶ First, 9, 10, 13. See e.g. *Helleyer v. Prendergast*, 176 App. Div. 383, (2nd Dep't 1917) (sustaining citizenship requirements for public employment and the career civil service in New York City).

* Indeed, the civil servant has a more proximate relationship to the affairs of government than an attorney employed in the private sector. In contrast to the civil servant's exclusive concern with government, the attorney in private practice is not normally involved in formulating or executing government policy. But see *In re Griffiths*, *supra* (noting instances where Connecticut attorneys act as public officers).

"support the Constitution of the United States and the Constitution of the State of New York". N.Y.S. Const. Art. 13, § 1; Public Officers Law § 10; Civil Service Law § 62.*

In contrast to the citizen, the alien cannot identify completely with the public interest of the country of his residence. Indeed, the privileges and burdens incident to alien status reflect the alien's primary allegiance to the country of his nationality.** *Harisiades v. Shaughnessy*, *supra* at 585-586; *Carlisle v. United States*, 16 Wall. 147, 154 (1872); Borchard, *Diplomatic Protection of Citizens Abroad* § 6, p. 11 (1927) (hereinafter "Borchard"). Thus the alien may claim the diplomatic protection of the country of his nationality against the country of his residence. *Harisiades v. Shaughnessy*, *supra* at 585. He cannot be obliged to participate in hostilities either against his own country, Article 23, 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2301-2302, or when his country is a neutral, 4 Moore, *International Law Digest* § 3548, pp. 52-53 (1906). In the United States, aliens are eligible for the draft only if they have immigrant status. 50 U.S.C. App. § 453 (1971). However, the immigrant may obtain an ex-

* Such oaths have been repeatedly sustained. *Cole v. Richardson*, — U.S. — (1972), 40 U.S. Law Week 4381 (April 18, 1972) (dissents by Douglas, J. and Marshall and Brennan, JJ., pertain to portions of the Massachusetts oath there in issue not required in New York); *Ohlson v. Phillips*, 397 U.S. 317 (1970); *Knight v. Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967); *aff'd* 390 U.S. 36 (1968). See also *Law Students Civil Rights Research Council v. Wadmond*, *supra* at 161-162, 189-190.

** The alien's allegiance to the country of his nationality is not a matter of individual preference or personal loyalty as the district court suggests (A. 83-84), but an attribute of his nationality which the country offering him hospitality is bound to respect. *Harisiades v. Shaughnessy*, *supra*; 1 Oppenheim, *International Law* §§ 291, 319, 320 (8th ed. 1955).

emption pursuant to treaty* or change his status to non-immigrant and thereby avoid military service. 8 U.S.C. § 1255.**

Conversely, an alien is subject to certain obligations to the country of his nationality and to certain burdens in the country of residence which again distinguish him from the citizen in terms of his capacity to represent the public interest. The country of the alien's nationality retains the rights of conscription and taxation, *Borchard* § 13, p. 21. The country of residence may deport him, e.g., 8 U.S.C. § 1251, *Carlson v. Landon*, 342 U.S. 524 (1951), or expel him in the event of hostilities with the country of his nationality (and in the absence of treaty provisions), *Borchard* § 46, p. 109, or take less drastic measures such as detention, concentration, or prohibition of residence in certain defined areas, *Borchard* § 46, p. 113. The alien may also be refused re-entry if he leaves the country, e.g., 8 U.S.C. § 1202.

If the alien takes an oath of allegiance to the United States and the State of New York, he does not lose the privileges incident to alien status nor is he relieved of its burdens. That may only be achieved through naturalization.*** At best, in taking such an oath, an alien evidences

* Currently, there are treaties in force with 16 countries exempting their nationals from service in the United States Armed Forces. 8 U.S.C. § 1101 (note).

** Aliens who are non-immigrants may work in the United States. Eg., 8 U.S.C. § 1101 (g) (15) (A) (iii), (B), (E), (F), (H), (J), (K), (L). Since the district court declared § 53 unconstitutional on its face, the decision, unless reversed or modified would permit both non-immigrants and immigrants to compete for the career civil service.

*** But see 8 U.S.C. § 1481(a)(2) stating, *inter alia*, that an American shall lose his nationality by "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof". However, the validity of 8 U.S.C. § 1481(a)(2) is in doubt following *Afroyim v. Rusk*,

his good faith toward the country of his residence. At worst, he employs it as a device to obtain economic advantages offered by that country. See *Kawakita v. United States*, 343 U.S. 717, 735-736 (1952). However, regardless of motive, the alien cannot place himself on the same footing as a citizen with respect to public employment by indicating his willingness to take the required oath.

Moreover, in purely practical terms, the citizen and the alien are not similarly situated with respect to employment in the career civil service. This branch of public employment is intended to provide the state with continuity in the management of its affairs, *United Public Workers v. Mitchell*, *supra* at 121 (opinion of DOUGLAS, J. dissenting in part), and its designation as the "career civil service" evidences the common understanding that an appointment is commencement of long-term employment covering the career service period of twenty to twenty-five years. The career civil service employee's statutory rights to promotion through examination, tenure,* seniority preferences and pension benefits are fur-

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supra. There § 1481(a) (5) providing for loss of nationality upon voting in a foreign election was invalidated on the ground that Congress was without power to divest a United States citizen of his nationality without his specific assent. Compare *Rogers v. Bellei*, 401 U.S. 815 (1971), sustaining 8 U.S.C. § 1401(b) providing that a child born abroad to an American citizen and an alien shall lose his American nationality unless he is continuously resident in the United States for five years between the ages of fourteen and twenty-eight. Assuming the validity of legislation like § 1481(a) (2) and its general use among nations, an alien would succeed in relieving himself of his obligations to the country of his nationality if he took the oath required of public employees by the State of New York but only at the cost of becoming a stateless person.

* Tenure is also granted to certain veterans and volunteer firemen who are not employed in the competitive class, Civil Service Law § 75 subd. 1(b).

ther evidence that career service is intended for the long term employee.*

As noted, the alien is subject to deportation** and expulsion as well as conscription by the country of his nationality, p. 25 *ante*. In light of these factors, the state cannot be required to place the same reliance on the availability of the alien over the career service period that it does upon the citizen.***

* E.g. N.Y. Const. Art. 5, § 6; Civil Service Law §§ 50, subd. 1, 51 and 52 (competitive examinations required to determine merit and fitness, for original appointment and promotions); § 61, subd. 1 (requiring the selection of one of every three applicants on eligible list when appointments are made); § 65 (establishing a preference in available positions for applicants successful in examination as against provisional appointees); § 75 (requiring a hearing for removal or other penalty on charges of misconduct or incompetence); § 76 (establishing a right to administrative appeal following disciplinary proceedings); and §§ 80 and 81 (establishing seniority preferences in the event of abolition or consolidation of positions and for reinstatement. See also N.Y. Retirement and Social Security Law establishing the New York State Employees Retirement System and N.Y.C. Administrative Code § B83-1.0 et seq. establishing the New York City Employees' Retirement System (providing for mandatory membership by competitive class employees, vested rights generally after five years of service and full benefits upon retirement after twenty or twenty-five years depending on the member's title.)

** 17,639 aliens were deported during fiscal 1971 (1971 Annual Report of the Immigration and Naturalization Service); 16,893, during fiscal 1970 (1970 Annual Report of the Immigration and Naturalization Service); and 10,505, during fiscal 1969 (1969 Annual Report of the Immigration and Naturalization Service).

*** The district court's comparison between the risk to the service from the departing alien and the citizen who moves interstate is inapposite since it fails to take account of the fact that the alien's departure may well be involuntary. (A. 85). Further the statutory rights incident to competitive class employment (first footnote this page) are intended to encourage voluntary continuation in service. They amply support the conclusion that the career service employee will not lightly disregard the benefits that accrue through length of service to start afresh in a different state.

The fact that aliens may compete for positions in the career civil service when waivers are in effect pursuant to § 53, subd. 2 does not invalidate the instant classification. Cf. *Dunn v. Blumstein*, *supra* 357-360.

The terms of the statute provide that the citizenship requirement may be waived only upon a finding that "an acute shortage of employees exists in any particular class or classes of positions." In face of such a shortage, the need of the government to conduct its business in an orderly manner outweighs the risks to the career service occasioned by the employment of aliens. However, the statute recognizes these risks in requiring that the alien appointed under waivers "shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship." In imposing this limitation, the risks occasioned the service are reduced to the minimum consistent with the government's conduct of its affairs.

The competitive character of the career civil service and the promotional opportunities afforded an employee in that class of positions require that the risks embodied in the public employment of aliens be expressed in a rule of general application like § 53.

The career civil service is a "merit system". See generally *United Public Workers v. Mitchell*, *supra* at 96-103 and opinion of DOUGLAS, J. dissenting in part at 120-125. Positions are ranged within occupational groups in order of degree of responsibility, or by "title". Appointments and promotions are based on success in examination requiring uniform conditions of competition.* Thus a title must be either open or closed to aliens. In selecting among applicants, the public employer's discretion to consider the suitability of an applicant in terms other than his success in examination is severely circumscribed. He must select one from among three applicants standing highest

* N.Y.S. Const. Art. 5, § 6; Civil Service Law §§ 44, 50, 51, 52.

on a list established on the basis of competitive examination or leave the position vacant.* Thus, if one or more aliens is among the group of three applicants, the opportunity for appointing authority to reject the alien as unsuitable because of his conflicting allegiance and the other incidents of alien status would be very limited, if not nonexistent. If he did reject the alien, his choice would then be limited to the remaining citizens, or citizen, regardless of whether he believed them otherwise qualified. In this manner, the narrow discretion allowed the appointing authority to select from among three equally situated applicants would be frustrated, if not entirely removed.

Once appointed, the employee accrues a statutory right to compete for the next higher title,** as well as rights to tenure, seniority preferences and pension benefits.*** His opportunities for promotion continue until the highest title in the occupational group is reached. Throughout the process, the appointing authority must choose one out of the three applicants standing highest on the list established following examination for the particular title.****

In view of these characteristics of the career civil service, the consideration of alien status in terms of an applicant's qualifications for appointment cannot be effective if left to the exercise of administrative discretion. Indeed, in the absence of a rule of general application, it is apparent that the stringent limitations imposed on public employer's discretion in selecting among applicants and the promotional rights afforded the employee upon appointment would require that the alien be treated on iden-

* Civil Service Law § 61, subd. 1.

** Civil Service Law § 52.

*** See footnote p. 27, *ante*.

**** Civil Service Law § 61, subd. 1.

tical terms with the citizen in the entire range of positions within that class.*

In contrast, a rule of general application is not required in the exempt and non-competitive classes.** These classes contain discrete positions,*** place no limitations on the public employer's discretion in the selection process**** and do not vest the employee with any statutory right to compete for promotion to higher "titles". Thus, in making an appointment to these classes, the public employer is free to consider the alien status of the applicant among his other qualifications and to balance the risks occasioned

* It is equally apparent that the suggestion that career civil service positions requiring citizenship can be segregated from those which do not must be rejected. See concurring opinion of *Lumbard, C. J. (A. 90).*, and *Jalil v. Hampton, supra*, at p. 12, (remanding consideration of the federal career service citizenship requirements for a determination, *inter alia*, of the type of positions where citizenship is a *bona fide* qualification). If the premise is accepted that citizenship is more relevant for some positions than for others, it follows that the significance attached to it is determined by the degree of responsibility incident to the position. However, as noted, the characteristics of the career civil service require that once an alien is appointed to the service he be afforded right to compete for positions of increasing responsibility on the same terms as citizens. Thus it is impossible as a practical matter, and indeed, inconsistent with statutory rights afforded career employees, to employ the alien in an entrance level or middle echelon position and to then deny him access to the positions of higher responsibility. See also *United Public Workers v. Mitchell, supra* at 102-103 (rejecting the suggestion that only civil service employees in administrative categories, not industrial workers, should be subject to the Hatch Act).

** The citizenship requirements for the laborers on public works are set forth in N.Y. Labor Law § 222.

*** Civil Service Law §§ 41, 42.

**** A non-competitive employee is required to pass a "non-competitive examination" (Civil Service Law § 42) usually consisting of a review of his experience. The public employer is not required to select one of three applicants in making appointments to the non-competitive class. Cf. Civil Service Law § 61, subd. 1.

by that status against the need for the alien's talents. If he chooses to employ the alien, his selection has no significance beyond the immediate situation. His choice among future applicants is not limited, and his decision has no effect on positions of higher responsibility within those classes.* Moreover, the career civil service is the only class of positions designed to insure continuity of service and thus the only class where the availability of the applicant over the long term is a relevant consideration. See discussion pp. 26-27, *ante*.

C. The state interests supporting Civil Service Law § 53 outweigh the interests of the aliens affected by the classification.

To determine whether the governmental objectives supporting a classification are "compelling", the Court must weigh the state interests reflected in the statute against the interests of the individuals in the affected class.** If the governmental objectives preponderate, the statute must be sustained. *Dunn v. Blumstein*, *supra* at 335; *Williams v. Rhodes*, *supra* at 30; *Shapiro v. Thompson*, *supra* at 683.

* The suggestion of the district court that the exempt and non-competitive classes contain "more responsible positions" than the career civil service is without foundation (A. 91-92 n. 6). For example, the following positions are included in the career civil service: Chief Investment Officer (starting salary, \$32,169), Chief Accountant Public Service (\$23,599), Director of Special Investigation (\$27,640), Assistant Director of Workmen's Compensation Board Operations (\$26,230), Director of Labor Standards (\$27,640).

** As argued in subpoint A, *ante*, the "compelling state interest test" is only properly applied to classifications which infringe specific constitutional or fundamental rights of the members in the affected class. Civil Service Law § 53 does not infringe any constitutional or fundamental right of aliens. Accordingly, the discussion which follows is in terms of the aliens' "interests", not rights.

Appellants have already established that the state interests reflected in § 53 are valid. The government cannot be required to conduct its affairs through the agency of persons who are not members of the state and who cannot bear it complete allegiance; it cannot be required to employ persons who by reason of their foreign allegiance and the special privileges and burdens of alien status and do not have the capacity to identify completely with the public interest. Appellants have likewise established that these interests can only be given effect in the career civil service through the use of a rule of general application like § 53 (Subpoint B, *ante*). Compare *Dunn v. Blumstein*, *supra* at 345-360; *Williams v. Rhodes*, *supra* at 31-34 and *Shapiro v. Thompson*, *supra* at 633-638, in which this Court found that the state interests there involved could be achieved by "less drastic means." Cf. *Shelton v. Tucker*, 364 U.S. 479, 488 (1965).

In contrast, the aliens' interest in the career civil service is merely the expectancy of an appointment if he succeeds in the examination and selection process. *Board of Regents v. Roth*, *supra* at 5082-5083. The significance of even this interest is reduced by the fact that the alien may compete for the career service when waivers are in effect under § 53, subd. 2.

Moreover, the alien has it within his power to be treated identically with citizens for all purposes simply by seeking naturalization. If he chooses to retain his allegiance to the country of his nationality while pursuing the economic advantages of a career here, the United States and the State of New York permit him to do so, but in accordance with the alien's choice, continue to recognize his identity with his homeland. See *Harisiades v. Shaughnessy*, *supra* at 585-588.

POINT II

Civil Service Law § 53 does not conflict with any federal statute or with any paramount federal policy prohibiting the states from denying aliens entrance and abode. Congress has not undertaken to regulate aliens in terms of their suitability for employment by the states, and federal policy, as expressed with respect to the federal career service, is identical with that of the State of New York under § 53.

The State of New York has enacted § 53 pursuant to its sovereign power to determine the qualifications of its own employees. This power is reserved to the states under the Tenth Amendment. It has not been delegated to Congress. *Maryland v. Wirtz*, 392 U.S. 183, 196-199 (1968) and opinion of DOUGLAS, J. dissenting at 205; *State of New York v. United States*, 326 U.S. 572, 582 (1946) (opinion of FRANKFURTER, J.), opinion of STONE, J. concurring at 587 and opinion of DOUGLAS, J. dissenting at 592-596.

That the particular qualification here in issue is concerned with alien status does not make it an inappropriate exercise of the states' Tenth Amendment power. On the contrary, it is a decision the state is entitled to make for reasons satisfactory to its people.

This Court has repeatedly recognized the states' power to make laws with respect to aliens notwithstanding the federal power to conduct foreign relations of the United States, U.S. Const. Art. 1, § 8, cl. 3, Art. 2, § 2, cl.2,* and

* *Clark v. Allen*, 331 U.S. 503 (1947) (sustaining the validity of a California reciprocity statute conditioning the distribution of decedents' personal property to alien non-residents); *Zschernig v. Miller*, 389 U.S. 429, 435 (1968) (invalidating application of similar Oregon statute used to make "minute inquiries concerning the actual administration of foreign law . . . [and] into the credibility of foreign diplomats" but acknowledging the states' power to legislate in this area.)

despite the Congressional power to establish a "uniform Rule of Naturalization", U.S. Const. Art. 1, § 8, cl. 4.*

Even if the wholly revolutionary assumption be made that Congress could legislate with respect to the qualifications of the employees of the several states, it certainly has not done so in the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* or in 42 U.S.C. § 1981. The incongruous position of the district court on this point is demonstrated by the federal career service regulations which treat aliens in the same manner as § 53.

A. Congress has not enacted a comprehensive plan which pre-empts the states from considering alien status in determining the qualifications of public employees.

Congress has not legislated with respect to aliens' qualifications for public employment in the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*** It has merely provided, as in § 1182(a)(14), that the entering alien obtain a certificate from the Secretary of Labor indicating that his first job in the United States will not adversely effect unemployment at his destination or wages and making conditions in his particularr trade.*** Compare *Graham v. Richardson*, *supra* at 377 citing extensive provisions of the Immigration and Nationality dealing expressly with indigent aliens).

Section 1182(a)(14) and related provisions cannot be read to evidence Congressional intent to preclude further consideration of alien status in the numerous career pos-

* *Graham v. Richardson*, *supra* at 372; *Takahashi v. Fish & Game Commission*, *supra* at 419-420.

** The legislative history of the act is similarly silent of any intent to regulate in this field. 1952 U.S. Code and Admin. News 1651.

*** See also 8 U.S.C. § 1152(a)(3) (giving priority in the issuance of immigrant visas to persons with professional training or exceptional ability in the sciences or arts) and § 1153(a)(6) (giving priority to skilled or unskilled laborers where a shortage exists in the United States).

sibilities the alien might pursue after entry, including public employment.* See *Florida Avocado Growers v. Paul*, 373 U.S. 132, 140 (1963) (rejecting argument that federal certification of avocados as "mature" precluded California from requiring an additional and more stringent standard of maturity). Indeed, such an interpretation would be inconsistent with the Secretary of Labor's establishment of occupational categories which are closed to aliens. See 29 C.F.R. §§ 60.2(a)(2), 60.7 Schedule B (1972).

Even assuming that the certification provisions of the Immigration and Nationality Act look beyond the alien's first job in the United States, § 53 must be sustained unless it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Florida Avocado Growers v. Paul*, *supra* at 141; *Swift v. Wickham & Co. Inc.*, 230 F. Supp. 398, 406 (S.D.N.Y. 1964) *aff'd* 364 F. 2d 241 (2d Cir. 1966), *cert. den'd* 385 U.S. 1036 (1967). Congress has repeatedly enacted legislation refusing budgetary authorization for aliens appointed to the federal career service.** Accordingly, Section 53 cannot be deemed an "obstacle" to the accomplishment of any Congressional purpose or policy. *DeVeau v. Braisted*, 363 U.S. 144, 156 (1960).

* When the named appellees entered the United States, they were certified for jobs in the private sector unrelated to their subsequent positions with the City of New York. (See Deft's Exhibit "1"; A.56[3]; Deft's Exhibit "2"; A.62[2]; Deft's Exhibit "3"; A.68[3]; Deft's Exhibit "4"; A.73[3].)

** General Government Appropriations Act, 1972, Pub. L. 92-49, 85 Stat. 108 § 602 (excerpted at Exhibit "1"); Public Works Appropriation Act, 1971, Pub. L. 91-431, 84 Stat. 890 § 502; Public Works Appropriation Act, 1970, Pub. L. 91-144, 83 Stat. 336-7 § 502. These acts reflect the policy of the United States Civil Service Commission as set forth in 5 C.F.R. 338.101 (1972). The authorization contained in the acts for the payment of declarant aliens was not intended as a change in that policy. *Mow Sun Wong v. Hampton*, *supra* at 531.

Moreover, the qualifications of public employees of the several states are particularly inappropriate for federal pre-emption. See *Florida Avocado Growers v. Paul*, *supra* at 143, 146. Compare *Hines v. Davidowitz*, *supra* (invalidating Pennsylvania alien registration law following enactment of express federal statute applicable to all aliens residing in the United States where uniform national rule was appropriate).

Reliance on 42 U.S.C. § 1981 as precluding the enforcement of § 53 is similarly inappropriate. Access to public employment is not a matter of the "security of persons and property" within the meaning of the statute. *Heim v. McCall*, *supra* at 193-194 (construing identical language in a treaty with Italy and sustaining the exclusion of aliens from public works). See also *Pastone v. Pennsylvania*, *supra* at 145 (construing same language and sustaining prohibition on aliens hunting wild game).

B. Civil Service Law § 53, does not erect an obstacle to aliens entering and abiding within the State of New York inconsistent with federal policy.

The federal government places the same limitations on the employment of aliens in its career service as does the State of New York under § 53. See discussion at pp. 14-15, 35, *ante* and Exhibit "1". Accordingly § 53 cannot be regarded as inconsistent with any "paramount" federal policy. Cf. *Graham v. Richardson*, *supra* at 378-380.

In relying on *Truax v. Raich*, 239 U.S. 33 (1915) and *Graham v. Richardson*, *supra*, in this context, the district court misapprehended the relevance of those cases to the case at bar.

In *Truax*, the court invalidated an Arizona statute which barred aliens from "the entire field of industry with the exception of enterprises that are relatively very small", 239 U.S. *supra* at 40, finding that the effect of that legislation

was to deny aliens "the ordinary means of earning a livelihood . . . in the common occupations of the community" 239 U.S. *supra* at 41. In *Graham*, the court invalidated Pennsylvania and Arizona statutes which had conditioned the necessities of life on citizenship or an alien's long term residence although the alien and the citizen were identically situated with respect to the individual and state interests there involved.

Public employment is not a "common occupation of the community." This distinction is clear in *Truax* since it was decided with *Heim v. McCall*, *supra* and *Crane v. New York*, *supra*, which sustained limitations on the employment of aliens on public works projects. As appellants have shown, the unique relationship between the public employee and the State requires that the distinctions inherent in alien status be recognized, and, with respect to the career civil service, effectuated by a rule of general application. See Point I.

Moreover, the narrow and transitory limitation embodied in § 53 cannot be equated with restrictions in *Truax* and *Graham*. For a state to foreclose aliens from practically every job in the private sector or to deny him the necessities of life should he become indigent is the equivalent of denying him entrance and abode. A transitory limitation on an alien's opportunity to compete for appointment in one class of public employment does not have the same effect as evidenced by the fact that notwithstanding enforcement of § 53 on a statewide basis since 1939, New York State has the largest number of alien residents of any State in the Union with the exception of California.*

* In 1971 there were 4,227,219 aliens living in the United States. California had the largest concentration with 996,107, New York was second with 723,075, and Florida, third with 314,596. 1971 Annual Report of Immigration and Naturalization Service Table 34.

CONCLUSION

The decision below should be reversed and the complaint dismissed.

Dated: New York, New York, August 30, 1972.

Respectfully submitted,

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Exhibit "1"

5 U.S.C. § 3301 states in pertinent part:

The President may—

- (1) Prescribe such regulations in the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought; and
- (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

• • •

General Government Appropriations Act, 1972, Pub. L. 92-49, 85 Stat. 108 § 602 States in pertinent part:

[N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post or duty is in continental United States unless such person (1) is a citizen of the United States. . . .*

Executive Order 10577, November 22, 1954, 19 Fed. Reg. 7521, § 2.1 states in pertinent part:

(a) . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

* See also Public Works Appropriations Act, 1971, Pub. L. 91-431, 84 Stat. 890 § 502; Public Works Appropriations Act, 1970, Pub. L. 91-144, 83 Stat. 336-7 § 502.

5 C.F.R. § 338.101 (1972) states in pertinent part:

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under Section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute.

Supreme Court of the United States

No. 1221

JOHN B. CLARK, Appellant, v. The New York City Police Department, and JAMES J. HENNING, City Marshal of New York and Sheriff of New York City and County, Respondents.

Argued.

4

PATRICIA M. L. LORRAINE, Esq., for Appellant.
JAMES J. HENNING, Esq., for Respondents.
JAMES J. HENNING, Esq., for Respondents.
JAMES J. HENNING, Esq., for Respondents.

Argued.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

APPEAL FOR AFFIDAVIT

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APPEAL FOR AFFIDAVIT

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